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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 750

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, AFL–CIO ET AL., PETITIONERS

v.

FLORIDA EAST COAST RAILWAY COMPANY

No. 782

UNITED STATES OF AMERICA, PETITIONER

v.

FLORIDA EAST COAST RAILWAY COMPANY

No. 783

FLORIDA EAST COAST RAILWAY COMPANY, CROSS-PETITIONER

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS RESPONDENT IN NO. 783

The contention principally urged both by the carrier (FEC) and the Association of American Rail-

roads, as *amicus curiae,* is that rates of pay, rules and working conditions as provided in existing collective bargaining agreements are, as a matter of law, entirely "suspended" during a lawful strike, leaving the carrier free to operate under any rules, conditions and pay rates it chooses. Thus FEC asks this Court to "vindicate" its right "during the strike to operate free of the necessity of compliance with its agreements with the striking labor organizations" (FEC Br. p. 26), and the *amicus* Association urges that any struck carrier is "entitled in its exercise of its right of self-help to operate or attempt to operate as best it can for the duration of the work stoppage *under such temporary working conditions as it alone deems necessary* and which are not otherwise unlawful" (Amicus Br. p. 5; emphasis added). FEC suggests that such a rule is not a serious incursion into the regulatory scheme of the Railway Labor Act, since unions desiring to compel carriers to abide by their agreements could obtain relief "instantly by the unions calling off the strike" (FEC Br. p. 27).

In our main brief we pointed out how the rule of total "suspension" thus urged here by the carriers is (1) flatly inconsistent with the terms of the Railway Labor Act (pp. 19–25); (2) unsupported by the legislative history of that Act (pp. 25–26, n. 18); (3) contrary to past practice in the railroad and airline industries under the Act (pp. 38–44); and (4), most importantly, would almost surely disrupt—and perhaps entirely destroy—the good faith statutory bargaining and mediation which the Act requires (pp. 25–33). In-

deed, we showed that such a rule of law has been squarely rejected as destructive of the duty to bargain in good faith even under the National Labor Relations Act, which contains no explicit *status quo* provisions requiring adherence to existing agreements during a strike and where strikes typically occur only after existing agreements have expired (pp. 33 and 38–40, n. 24 and n. 28).

For these reasons, the court of appeals was clearly correct in rejecting the contention of total "suspension" now urged by the carriers (R. 909). The carriers now do not seriously urge that their position is affirmatively supported by the terms of the Act or its history.[1] Nor do they address themselves at any point to the devastating effect which their proposed rule would have upon good faith statutory bargaining under the Act, other than to urge, as noted above,

[1] FEC urges that "temporary practices necessary to rectify the lack of manpower resulting from a strike do not themselves involve a 'change * * * in agreements'" prohibited by Section 2, Seventh, of the Act (FEC Br. p. 23). The words omitted from the statute by FEC in making the contention are, however, of considerable importance. The Act prohibits not a "change * * * in agreements," as FEC states (which might refer only to a permanent change) but a "change [in] the rates of pay, rules, or working conditions of its [the carrier's] employees, as a class, as embodied in such agreements." As written by Congress the statute thus clearly prohibits temporary as well as permanent changes in conditions as set by agreements. The *amicus* Association of American Railroads urges otherwise, with no support for its view in the language of the statute, on pp. 45–49 of its brief. The legislative history is discussed at pp. 24–25 of FEC's brief and pp. 50–53 of the *amicus* brief.

that a union wishing to compel a carrier to abide by its agreements and the Act can always "call * * * off the strike," a strike being the only means at a union's disposal for pursuing its demands after statutory bargaining has been exhausted without a negotiated solution. The carriers do, however, suggest that an unlimited right of "self-help" once a lawful strike commences, permitting a carrier to take whatever steps it deems necessary to nullify the effect of the strike, is supported by railway practice, certain judicial decisions and awards of the National Railroad Adjustment Boards, and common-law contract principles. These contentions warrant a short response. We also respond here to FEC's suggestion (Br. pp. 33–42) that even if collective bargaining agreements remain vital during a strike (as we contend), federal district courts lack jurisdiction to compel adherence to those agreements because of the "minor" dispute jurisdiction of the National Railroad Adjustment Board.

1. We note first that the doctrine urged here by the carriers—*i.e.*, that their existing collective agreements are of no force whatsoever in prescribing wages, rules or working conditions during the course of a lawful strike—is not only contrary to the plain language of the Railway Labor Act, but also to the terms of the agreements themselves. FEC's agreements typically contain express conditions that the rules and rates of pay contained therein "shall be subject to change only in the manner prescribed by law" (Rule 157, Agreement between FEC and its Machinists, Boilermakers, etc., p. 74). Nor are these agreements

open to the interpretation that they become inapplicable during a strike when supervisors or replacements are used as substitutes for striking union members. They provide that:

> It is understood that this agreement shall apply *to those who perform the work specified in this agreement* in the Maintenance of Equipment Department of this Railway wherein work covered by this agreement is performed. [Id., p. 1; emphasis added.]

Moreover, even FEC's officials have not invoked the legal doctrine of total suspension of existing agreements now asserted by their counsel and the *amicus*. Mr. Wycoff, FEC's Vice President, stated his view before the district court that "the rules that are in effect are those that are negotiated. We can't change those rules unilaterally. We can deviate from the rules where we have to in order to operate the property" (R. 295).

2. Secondly, the carriers seem to differ with our understanding that industry practice does not support a rule permitting carriers to ignore existing collective bargaining agreements during the course of a lawful strike (FEC Br. pp. 27–32; *Amicus* Br. pp 19–22). We stated in our main brief that we could find no previous instance in which a carrier had urged the right to operate during a strike free from its existing agreements or in which a court had accepted such a contention (p. 39). We stated, more specifically, that strike operations in the railroad industry had been rare, thus negating any established practice regarding the rights of a struck carrier to disregard the

terms of its agreements (p. 41); and that in the airline industry, where strike operation has been more frequent, such operation has been undertaken with adherence to existing agreements, *e.g.*, *Western Air Lines* v. *Flight Engineers Int'l Ass'n*, 194 F. Supp. 908, 909 (S.D. Cal.) (pp. 41–42). Finally, we urged that the awards of the National Railroad Adjustment Boards reflected no understanding that existing agreements become inapplicable upon the occurrence of a strike but that, on the contrary, such awards reflected an understanding that agreements remained applicable during strike periods (pp. 42–43, n. 30).

In their briefs, neither FEC nor the *amicus* point to any evidence to rebut the fact that no carrier prior to this case has affirmatively asserted or practiced the right to operate during a lawful strike wholly without regard to its existing collective agreements. While the Annual Reports of the National Mediation Board for the period 1955–1964 show no railroad strike of consequence in which operation was attempted (U.S. Br. p. 41), the *amicus* points to three recent instances where limited strike operation was attempted primarily through the use of supervisory personnel for short periods of time (the longest period being 47 days by a local switching railroad in Houston, Texas).[2] *Amicus* does not suggest that these carriers,

[2] If that railroad had substantially disregarded existing terms of employment while operating during that 1965 strike, the unions would likely have invoked the decisions of the Fifth Circuit in this case to obtain an injunction against such conduct.

in their limited use of supervisory personnel, urged or practiced a right to operate without regard to existing agreements—rather, the fact that only limited operations with supervisors were attempted in almost every instance would seem to suggest, if anything, that existing agreements were at least generally, and perhaps entirely, adhered to.[3] In all events, such instances certainly do not establish a "common practice" (*Amicus* Br. p. 20) in the railroad industry wholly to ignore existing agreements during a lawful strike.[4]

In the airline industry, the carriers again point to no instance where "suspension" of existing agreements during a strike was practiced or asserted. As we note in our main brief (pp. 41–42, n. 29) the explicit assumption has been, to the contrary, that existing agreements

[3] Limited use of supervisory personnel would likely not contravene any existing agreements. See *Brotherhood of R. Trainmen* v. *Ky & Ind. Terminal R. Co.*, 122 NRAB (1st Div.) 38 (1955).

[4] Nor does the Transcript of Proceedings of the Presidential Railroad Commission (1961), pp. 14666–14822, referred to in the *amicus* brief (pp. 20–21), show that it is "common practice" for railroads to operate during a strike; only one such instance of operations during a strike (by one small railroad) with supervisory personnel, and none with replacements, is referred to in that testimony. In fact, a union representative at those proceedings remarked that generally "railroads choose to close down when they have strikes." *Id.*, p. 14719. There is considerable testimony in the material referred to by the *amicus* that railroads have, on a number of occasions, served a single struck plant on their line by using supervisory personnel, when employees refused to cross picket lines. Such action would probably not violate existing agreements. See footnote 3, *supra*.

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remain in full force during a lawful strike when operation is attempted.[5]

Nor do the awards of the National Railroad Adjustment Board support the proposition, as FEC contends (Br. 29) that "collective bargaining agreements are not in force during a strike." Indeed, these awards have precisely the opposite import. Most of the awards FEC cites hold that, when faced with a strike, a carrier may invoke "emergency" provisions *in its agreements,* and take steps to counteract the strike, such as locking out employees, *in conformance with the provisions of its agreements. E.g., Brotherhood of Ry. & S.S. Clerks* v. *Macon, Dublin & Savannah R. Co.,* 98 NRAB (3d Div.) 730 (1961); *Brotherhood of Maintenance of Way Employees* v. *Missouri Pac. R. Co.,* 48 NRAB (3d Div.) 583 (1950); *Brotherhood of Maintenance of Way Employees* v. *St. Louis Southwestern Ry. Co.,* 48 NRAB (3d Div.) 291 (1950) (See also our main brief, pp. 42–43, n. 30). There is no suggestion in these awards that a carrier becomes

[5] FEC does suggest, however (Br. pp. 18, 29), that in one instance, see *Flight Engineers Int'l Ass'n.* v. *Eastern Air Lines,* 208 F. Supp. 182 (S.D. N.Y.), affirmed, 307 F. 2d 510 (C.A. 2), certiorari denied, 372 U.S. 945, Eastern Air Lines asserted, and was granted, the right to operate during a strike in violation of an existing agreement regarding crew complements. The fact is, however, as the opinions show, that the change made by Eastern after the strike commenced was the very change over which the Engineers struck. The court held that since that proposed change had been through full statutory negotiation, its unilateral implementation by the carrier after the statutory procedures were exhausted was fully consistent with the terms of the Act. See also, our main brief, footnote 29, p. 42.

free of its agreements once a strike commences—their reliance upon emergency provisions of the agreements to justify the action taken means exactly the contrary.

Another NRAB award cited by FEC shows even more clearly that other railroads have not thought that their agreements were wholly "suspended" during a strike. *Order of Ry. Conductors* v. *Boston & Maine R.* 89 NRAB (1st Div.) 821 (1950). The railroad in that case successfully defended a claim for a day's wages during a strike *not* on the ground that its agreement with the conductors was "suspended" by their strike (as FEC urges), but rather on the ground that no rights *under the agreement* had been denied claimant, who failed to make himself available for the operations being carried on during the strike. The clear implication, not disputed by the railroad, was that the railroad could not deny an employee in the striking craft his seniority rights or other rights as provided in the agreement, even though a strike was in progress.

3. FEC also relies upon decisions of this Court (*Brotherhood of Locomotive Engineers* v. *B. & O. R. Co.*, 372 U.S. 284) and of the Court of Appeals for the Second Circuit (*Pan American World Airways, Inc.* v. *Flight Engineers' Int'l. Ass'n.*, 306 F. 2d 840) for its proposition that a carrier has an unlimited right of "self-help" during a strike, which justifies total departure from its existing agreements in order to negate the effect of the strike. The *amicus* (Br. pp. 22–25) relies upon common-law principles of contract allegedly to the same effect.

This Court's decision in the *B & O* case holds that, once a dispute over a proposed change in existing agreements has fully exhausted the statutory procedures (as did the underlying wage and notice dispute in this case), "both parties, having exhausted all of the statutory procedures, are relegated to self help *in adjusting this dispute* * * *" (372 U.S. at 291, emphasis added). The court of appeals' decision is to the same effect. Thus, the union may strike to enforce its demands, as it did here (but it may not strike to enforce other demands which have not been fully negotiated); a carrier may lock out its employees to achieve its demands; and, most importantly, where the conditions in dispute are subject to the carrier's immediate control, it may unilaterally implement those conditions without the union's agreement (again so long as the carrier's changes do not go beyond the scope of the prior negotiations). See our main brief, p. 28 and n. 21.

Thus, the "self-help" which the Act contemplates is "self-help" *in adjusting the particular dispute which has been negotiated*—it is not, as the carriers suppose, "self help" to defeat a strike, as the employer deems necessary, regardless of the provisions of existing agreements. A carrier can no more use the occasion of a strike over one issue, which has been negotiated, to make general changes in existing agreements for the purpose of defeating the strike than would a union be justified in using the exhaustion of negotiations over one issue as the excuse for including in its strike de-

mands a broad range of issues which had never been subject to negotiation. See our main brief, pp. 28–29.

Nor is it accurate to say, as FEC repeatedly asserts in its brief (*e.g.*, pp. 15, 20, 26), that an unlimited right of "self-help" to permit operation in strike conditions must be recognized, for without such a right a carrier's only alternative would be to "capitulate" totally to the union's demands. It is simply fanciful to assume that a strike—even if the carrier is wholly prevented from operating during its course—exerts economic pressure only upon the carrier, and leaves the union free to insist upon the full measure of its demands without concern for its prospects should the strike continue. The union, no less than the employer, has strong incentives to end even the most effective strike through compromise. On the other hand, it *is* true that, where a carrier is able to use "self-help" to impose unlimited unilateral changes in order to operate fully and profitably during a strike, *its* incentive to settle the underlying dispute is undoubtedly diminished and perhaps entirely removed. Thus, under the carriers' argument, it is the union which must either capitulate, and end the strike, or permit the employer indefinitely to exercise sole control over all wages, rules and working conditions on the theory that collective bargaining agreements have no effect during a strike. Moreover, as we point out in our main brief (pp. 44–46), carriers faced with a strike, unlike em-

ployers under the NLRA, have an adequate remedy against capitulation to a union's demands in an offer to submit the dispute to arbitration.[8]

Similarly, common-law contract principles do not justify a carrier in wholly ignoring its existing agreements at the onset of a lawful strike (See *amicus* Association Br., pp. 22–25). In the first place, even if, under applicable common-law principles, a lawful strike totally "suspended" existing agreements, the Act (Section 2, Seventh) nevertheless forbids carriers to change "rates of pay, rules or working conditions * * * as embodied in agreements" regardless of what the common-law status of such agreements might be.

The argument is, in addition, erroneous quite aside from the statutory terms. It simply is not true that, in engaging in a lawful strike over wages, the union "flatly refused to honor the agreements" (FEC Br. 28), or "repudiated" the agreements (*amicus* Association Br. 26). There is nothing in FEC's agreements

[8] The argument (*amicus* Association Br., pp. 12–19) that carriers must be permitted wholly to disregard their agreements in order to perform their obligations to provide service to shippers is without substance. It is no "public service" for a carrier to take unilateral action which enlarges the area of a labor dispute and increases the difficulty of settlement. It cannot be argued, in the light of the actual factual situation here—instead of "on very few bare facts" (*amicus* Association Br. 3)—that FEC's unilateral actions, which have delayed settlement of this dispute for years, have been to the public interest. A carrier's obligation to provide service cannot override the stated purpose of the Railway Labor Act "to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions," 45 U.S.C. 151a(4), any more than it can justify a carrier's ignoring standards of safety in attempting to operate.

prohibiting a lawful strike over an issue unresolved by statutory bargaining and FEC points to no terms of its agreements which the unions have refused to perform. Indeed, any suit brought by FEC demanding either injunctive relief or damages against the unions for failure to perform their contracts by engaging in a lawful strike would obviously have been without legal basis. On the other hand, the case on which FEC and the *amicus* principally rely for the proposition that existing agreements are "suspended" during a lawful strike as a matter of contract law, *United Electrical, Radio & Machine Workers* v. *National Labor Relations Board*, 223 F. 2d 338 (C.A.D.C.), certiorari denied, 350 U.S. 931, is one in which "[t]he walkout was a material breach * * *" because it was in violation of an express no-strike clause. Moreover, this Court has since ruled that even such a *wrongful* strike in violation of a no-strike clause does not justify an employer in treating an agreement as entirely "suspended." *Packinghouse Workers* v. *Needham Packing Co.*, 376 U.S. 247.

The fact is that it is only FEC which has "repudiated" its agreements here. FEC agreed, without qualification, that its agreements "shall continue in effect until changed as provided herein or in accordance with the Railway Labor Act" (*e.g.*, Rule 76, Agreement between FEC and Clerical and Station Employees, pp. 88–89). It now seeks to treat that provision as ineffective because it interferes with its "right" to operate as it wishes during a strike.

4. Finally, we address ourselves to FEC's apparent contention (Br. pp. 33–42) that the district court here had no jurisdiction to enjoin unilateral changes prohibited by Section 2, Seventh, of the Act because, even if existing agreements are not suspended as a matter of law during a strike, the dispute here over the strike changes unilaterally instituted by FEC is a "minor" dispute subject to the exclusive primary jurisdiction of the National Railroad Adjustment Board. The Board, of course, has no injunctive powers.

It is true that "minor" disputes, within the primary jurisdiction of the adjustment board (see our main brief, pp. 19–20), may arise from actions taken by a carrier during a strike. *E.g., Western Air Lines* v. *Flight Engineers Int'l. Ass'n, supra; Brotherhood of Ry. & S.S. Clerks* v. *Macon, Dublin & Savannah R. Co.,* 98 NRAB (3d Div.) 730 (1961). As the court of appeals held, however, such "minor" disputes are ones over "whether *the agreement* authorizes action taken by the *Carrier.*" (336 F. 2d at 178–179; emphasis added). See also, *Elgin, J. & E.R. Co.* v. *Burley,* 325 U.S. 711. Proposed *departures from* existing agreements, on the other hand, clearly create "major" disputes over which the NRAB has no jurisdiction and as to which the *status quo* provisions of the Act, backed by the district court's injunction power, clearly apply. See, main brief for the United States, pp. 20–25; *Order of R. Telegraphers* v. *Chicago & N.W. Ry.,* 362 U.S. 330, 341; *Elgin, J. & E.R. Co.* v. *Burley, supra.*[7] With trivial exceptions, which we discuss

[7] FEC's contention (Br. 35–36), that no major dispute exists here because the sweeping unilateral changes it made did not

below, FEC has never suggested that any of the sweeping changes it unilaterally made in this case when the strike began were permitted by existing agreements. This is therefore clearly not a "minor" dispute over the meaning of existing agreements, and there is no basis for invoking the jurisdiction of the National Railroad Adjustment Board to interpret collective agreements when the carrier thus admits that the agreements, if applicable, do not permit its actions. Moreover, neither FEC nor the *amicus* remotely suggest that the question of law whether the agreements do indeed remain applicable during a strike is for the NRAB; such a question is, on the contrary, clearly for judicial determination. See, *e.g., John Wiley & Sons* v. *Livingston,* 376 U.S. 543.

It is true that, when genuine questions of contract interpretation arise during a strike, as in other periods, NRAB jurisdiction may properly be invoked. Indeed, such jurisdiction, permitting a carrier to urge

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look to the acquisition of future rights depends on the mistaken premise that FEC is not attempting to make prospective changes in terms of employment. Not only does FEC still propose to implement the "Uniform Working Agreement" on a permanent basis, in the negotiations now pending, but it also desires to change these working conditions radically for the future period of the strike.

Moreover, FEC's reasoning would appear to make *every* violation of Section 2, Seventh, and of the carrier's general duty to bargain (Section 2, First, 45 U.S.C. 152, First), a "minor" dispute. For example, were a carrier unilaterally to cut the wages of all employees 50 cents an hour, the carrier could argue that the employees could recover all lost wages from the NRAB, and that the adjustment board remedy is exclusive. Such a wage cut would, however, obviously create a major dispute. See *Burke* v. *Morphy*, 109 F. 2d 572 (C.A. 2), certiorari denied, 310 U.S. 635.

that a fair reading of its agreements permits some strike adjustments, is one of the persuasive reasons for rejecting a rule of law permitting "reasonably necessary" judicial exceptions to agreements during a strike. See our main brief pp. 49–50, n. 35. During the entire course of the litigation in the courts below, however, FEC has contended that only one departure from usual employment practices was in fact justified by existing agreements. FEC did assert (R. 209): "The contracting out of work is not prohibited by any of the agreements and much work has always been contracted out." FEC, however, offered no real evidence, either in contractual language or by way of extrinsic evidence of past practice, to support this allegation. Nor has FEC ever sought to refer this dispute to the NRAB, as permitted by Section 3 of the Act (45 U.S.C. 153).[8]

If FEC does wish, in fact, to pursue a dispute of contract interpretation before the NRAB, it will be time for the district court then to decide whether it should permit FEC to implement its view of the contract pending disposition of the dispute by the NRAB (see *Order of Ry. Conductors* v. *Pitney,* 326 U.S. 561, 566–567), or whether the circumstances justify enjoining the changes until the board acts, *New York*

[8] FEC now also appears to contend in this Court (Br. 39), for the first time, that the agreements involved in this case do not prevent it from disregarding craft and seniority district restrictions or using supervisors when sufficient personnel are not available.

Central R. Co. v. *Brotherhood of Loc. Fire. & Eng.*, 355 F. 2d 503 (C.A. 7). (See our main brief, pp. 49–50, n. 35).

CONCLUSION

For the reasons stated above, and in our main brief, the judgment of the court of appeals should be (1) affirmed insofar as it enjoins FEC from making unilateral changes in the rates of pay, rules and working conditions as provided in its existing agreements, and (2) reversed insofar as it permits the making of "reasonably necessary" unilateral changes in existing agreements.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.
JOHN W. DOUGLAS,
Assistant Attorney General.
PAUL BENDER,
Assistant to the Solicitor General.
DAVID L. ROSE,
WALTER H. FLEISCHER,
Attorneys.

APRIL 1966.

U.S. GOVERNMENT PRINTING OFFICE:1966